

REMARKS

Claims 1-12 are pending in the present application.

The Examiner has required election in the present application between:

Group I, claims 1-3 [sic., 4], drawn to a wireless communication device;

Group II, claims 5-8, drawn to a method of transmitting data over a server; and

Group III, claims 9-12, drawn to a method of transmitting data between devices.

In order to comply with the Examiner's Restriction Requirement, Applicant provisionally elects to prosecute Group I, directed to claims 1-4, for prosecution in the present application. Applicant reserves the right to file a Divisional application directed to the non-elected claims at a later date, if so desired.

This requirement for restriction is respectfully traversed for the reasons set forth below.

Applicant respectfully submits that the Examiner has failed to meet the required burden of showing that the groups of claims are independent and distinct, as required by law. 35 USC §121 specifically states that the Commissioner may require the application to be restricted if it contains two or more "independent and distinct" inventions claimed in one application. (emphasis added) 37 CFR §1.141 and §1.142 further repeat the language that the two or more inventions must be "independent and distinct" (emphasis added).

MPEP §802.01 provides specific definitions of the meaning of the terms "independent" and "distinct". MPEP §802.01 states that the terms "independent" and "distinct" do not mean the same thing, but in fact have very different meanings. The term "independent", as set forth in MPEP §802.01, means that "there is no disclosed relationship between the two or more subjects disclosed, that is, they are unconnected in design, operation, or effect". The term "distinct" means that "two or more subjects as disclosed are related, for example, as combination and part (sub-combination) thereof, ... and are patentable over each other".

The Examiner has set forth various reasons why the inventions are "distinct" from one another, by providing separate classifications for the groups, and by stating reasons why the groups are related. However, the Examiner has not met the burden of proving that the groupings are "independent" as required by the United States Code, the Code of Federal Regulations, and the Manual of Patent Examining Procedure. Further, Applicant respectfully submits that any policy set

forth in the MPEP mentioning independent or distinct which conflicts with the requirements for both independence and distinctness is superseded by the directives of the United States Code and the Code of Federal Regulations, which specifically require both independence and distinctness between properly restrictable groupings. Accordingly, Applicant respectfully submits that the requirement for restriction is improper, and respectfully request that the requirement for restriction be withdrawn.

Applicant respectfully submits that MPEP §808.01 states that inventions are independent "where they are not connected in design, operation, or effect under the disclosure of the particular application under consideration" and that "[t]his situation, except for species, is but *rarely present*, since persons will seldom file an application containing disclosures of independent things. (emphasis added). MPEP §806.04 cites the intended meaning of independent inventions by citing specific examples of independence, stating "[a]n article of apparel such as a shoe, and a locomotive bearing would be an example. A process of painting a house and a process of boring a well would be a second example."

Further, MPEP §806.04 states that "[w]here the two inventions are **process and apparatus**, and the apparatus **cannot be used** to practice the process or any part thereof, they are independent." (emphasis added).

Applicant respectfully submits that the groups set forth by the Examiner cannot be considered "independent", since the specification clearly discloses the relationship between the subject matter of the claims of these groupings, and thus, the groupings are not wholly unrelated or "independent". Therefore, Applicant respectfully submits that the instant application is not properly restrictable, since the Examiner has not shown that the inventions are "independent" as required by the U.S. Statute.

Accordingly, in view of the above remarks, reconsideration of the requirement for restriction, and an action on all of the claims in the application, are respectfully requested.

Favorable action on the present application is earnestly solicited.

If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone James T. Eller, Jr., Registration No. 39,538, at (703) 205-8000, in the Washington, D.C. area.

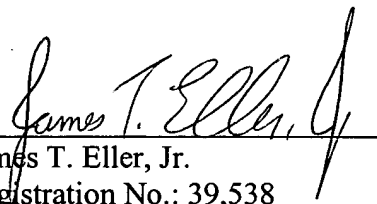
Application No.: 10/806,143

Docket No.: 3449-0313PUS1

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to our Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. § 1.16 or under § 1.17; particularly, extension of time fees.

Dated: April 13, 2006

Respectfully submitted,

By 

James T. Eller, Jr.

Registration No.: 39,538

BIRCH, STEWART, KOLASCH & BIRCH, LLP

8110 Gatehouse Road

Suite 100 East

P.O. Box 747

Falls Church, Virginia 22040-0747

(703) 205-8000

Attorney for Applicant